7UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ST. PAUL PARK REFINING CO., LLC,
D/B/A WESTERN REFINING

Cases 18–CA–187896
and 18–CA–192436

RICHARD TOPOR, an Individual

Florence I. Brammer, Esq., for the General Counsel.

Marko J. Mrkonich, Esq. and *Alice O. Kirkland, Esq.*
(Littler Mendelson, P.C.), of Minneapolis, MN
for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case principally alleges that St. Paul Park Refining Co., LLC (the Respondent) unlawfully suspended Charging Party Richard Topor for his protected concerted activity. The alleged activity is Topor's claim of a right to refuse to work under dangerous circumstances. On November 4, 2016, supervisors assigned Topor the task of injecting hydrochloric acid from a cylinder into a machine used in the Respondent's oil refining operations. The job required Topor to increase pressure in the cylinder by placing it in a water bath and heating the water. When doing so, Topor had to insure the cylinder wall temperature did not exceed 125 degrees, or risk the possibility of the acid exploding. During discussions about the job, Topor disagreed with his supervisors as to the safety of having other acid cylinders in the same area as the one being heated. When his supervisors proposed a solution to mitigate the safety concern, Topor did not concur. As a result, Topor called a safety stop and asked that a safety representative be called to address the dispute. Instead of calling that representative, the Respondent sent him home. It later issued him a final written warning and 10-day suspension for his conduct, and then denied him a quarterly bonus based upon that discipline. As discussed fully herein, I find that Topor was engaged in protected concerted activity when he called a safety stop, and that the Respondent's adverse actions towards him based on that activity violate Section 8(a)(1).

STATEMENT OF THE CASE

On November 9, 2016, Richard Topor (the Charging Party) initiated this case, by filing the original unfair labor practice charge in Case 18–CA–187896 against St. Paul Park Refining Co., LLC, d/b/a Western Refining (the Respondent). On January 30 and February 2, 2017, Topor filed amended charges against the Respondent in that case. On February 3, 2017, Topor filed a new charge against the Respondent in Case 18–CA–192436. On April 21, 2017, the General Counsel, through the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a consolidated complaint against the Respondent in those two cases. The complaint alleges the Respondent violated the National Labor Relations Act (the Act) by placing Topor on administrative leave on November 4, 2016; issuing him a final warning and 10-day suspension on November 14, 2016; and withholding his quarterly bonus on January 17, 2017, all due to his union and protected concerted activity. The consolidated complaint alleges that the Respondent's adverse actions towards Topor independently violate both Section 8(a)(1) and (3) of the Act. On May 5, 2017, the Respondent filed an answer to the complaint, denying the substantive allegations and asserting numerous affirmative defenses. On June 23, 2017, the General Counsel issued an amended consolidated complaint, adding an allegation that the Respondent violated Section 8(a)(1) at some point during the period of September through November 2016 by threatening employees with termination, stricter enforcement of work rules, and surveillance, because of contract negotiations. On July 7, 2017, the Respondent filed an answer to the amended consolidated complaint, denying the additional allegation. From July 12 to 14, 2017, in Minneapolis, Minnesota, I conducted a trial on the complaint. Thereafter, on September 6, 2017, the parties filed posthearing briefs.

On the entire record and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent operates an oil refinery in Saint Paul Park, Minnesota. In conducting its business operations during the past 12 calendar months, the Respondent purchased and received, at its Saint Paul Park facility, goods valued in excess of $50,000 directly from points outside the State of Minnesota. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answers to the complaints. I also find, as the Respondent admits, that the International Brotherhood of Teamsters, Local No. 120 (the Union or Teamsters Local 120) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At its refinery, the Respondent processes crude oil into various products, including gasoline and asphalt, for subsequent sale. The Company has 450 employees there, including 160 in operations. The operations employees work on a "DuPont" schedule, with four crews, two 12-hour shifts, and 24/7 operations for 365 days each year. The operating unit involved in this case works in the "north reformer" area of the refinery, a central hub for product processing. The Union represents employees in certain job classifications, including in the operations department. The classifications in the department are vacancy relief operator (VRO), console operator, field operator, and utility. Topor has worked for the Respondent for 13 years, including since 2008 as a VRO in the north reformer. At material times, Topor was assigned to crew 4, and his shift was from 6 a.m. to 6 p.m. His VRO job duties are to assist all crew members with their jobs and to fill in for anyone on the crew who is absent. Gary Regenscheid, the lead shift supervisor for crew 4, and Dale Caswell, a shift supervisor in the reformer area, are Topor's direct supervisors. Topor also served as a Union steward for the past 3 years.

The relevant collective-bargaining agreement between the Respondent and the Union ran from January 1, 2014 to December 31, 2016. In July 2015, the parties began negotiations for a successor contract. Topor was on the Union's bargaining team. Among the Respondent's negotiators were Michael Whatley, the manager of operations, and Timothy Kerntz, the director of human resources. In September 2015, the parties reached a tentative extension of the agreement. However, bargaining unit employees did not ratify the extension. Topor did not support that agreement and spoke with some of the 40 employees he represented about what he felt was good and bad about it.

Contract negotiations did not resume until November 29, 2016, after the Respondent suspended Topor.[1] At some point in the 3 months before then, Regenscheid spoke with Michael Rennert, a field operator who works on crew 4 with Topor. The two were in the "satellite" building, where the Respondent sometimes holds work meetings and which otherwise serves as a gathering place and break room for employees. The satellite has a table, kitchen, computers, and operations consoles for employee use. Regenscheid said to Rennert "Don't be surprised if a few people get fired, and they start searching lunchboxes when you go out the gate and have the dogs sniffing cars." Rennert asked him why they would do that. Regenscheid responded "Your contract is coming up." Rennert said, "Do you really think that they would do that?" Regenscheid said, "Yeah, I do." No one else was present for this conversation.[2]

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[1] All dates hereinafter are in 2016, unless otherwise noted.

[2] As to this conversation, I credit Rennert's testimony. (Tr. 87–89.) Throughout his testimony, including about this conversation, I found his demeanor to be confident and relaxed. He came across as a particularly believable witness. Rennert testified with specificity and consistency about the events he could recall and was frank about those he did not. Moreover, Regenscheid did not explicitly deny the conversation occurred or Rennert's account of what Regenscheid said. (Tr. 576.) Instead, in response to a somewhat leading question, Regenscheid denied making any statements to bargaining unit members about the 2016 negotiations to the best of his knowledge.

A. Contract Provisions and Policies Addressing Workplace Safety

The Respondent's refinery operations present numerous potential safety hazards to employees. Unsurprisingly, then, both the collective-bargaining agreement and the Respondent's employee handbook address workplace safety. Article 22 of the contract[3], entitled: "Safety," states in full:

> Section 22.1
> The Employer shall furnish a safety manual to all employees covered by this Agreement.
>
> Section 22.2
> Should any employee be of the opinion that an unsafe condition exists, it shall be their obligation to immediately inform their Company Representative of such fact and to that end the Employer will examine the facts so as to determine the safety factors and whether the job should proceed.

The Respondent's employee handbook[4] states in relevant part as to safety:

> 1.11 HEALTH, SAFETY & ENVIRONMENT
> POLICY
> A safe work environment is the shared responsibility of the Company and its Employees at all levels of the organization. The Company is committed to maintaining a safe environment in compliance with federal, state, and local safety laws, rules, and regulations. Employees must follow safety rules and exercise caution in all of their work activities. Safety is the responsibility of every Employee. The Health, Environmental, Safety, and Security Department can assist and advise Employees on safe work practices, but we are each responsible for performing our jobs safely.
>
> Employees are required to immediately report any unsafe conditions to their supervisors. Not only supervisors, but Employees at all levels of the Company are expected to identify unsafe issues, report them to Management, and assist in the correction of unsafe conditions as promptly as possible. The safety representative will issue a notice to correct any safety concerns

[3] GC Exh. 2.

[4] GC Exh. 3, pp. 18–19. The Respondent's handbook and other policies are applicable to unionized employees via the management-rights clause in the collective-bargaining agreement. GC Exh. 2, p. 39, art. 28.

> and follow-up will be carried out to ensure compliance. Safety violations may result in disciplinary action, up to and including termination.

The Respondent also maintains a "safety stop" policy,[5] which defines a stop as:

> A process that gives any [Respondent] employee or contractor the authority to stop a job and discuss potential risks along with appropriate mitigation measures.

The policy also sets forth responsibilities related to safety stops:

> 1.1 Responsibilities
> 1.1.1 All SPPRC employees and contractors are responsible for stopping unsafe actions or work without fear of reprisal. The leadership of the job is required to listen and address the concerns brought forward by the person asking that a job be stopped due to perceived safety risks.
>
> 1.1.2
> If a safety stop is called, the specifics of that event should be documented via the STOP Report so that personnel not directly involved will have access to accurate information of why the work was stopped and how the situation was resolved.
>
> 1.1.3 The worker who stops a job due to safety concerns may do so without fear of reprisal, since they are upholding the Refinery's core value of safety.

This policy also contains a 1-page bulletin describing a safety stop and when an employee could call one. The bulletin advises employees to "[p]lease use your ability to stop work that you feel is unsafe. Everyone is empowered (expected) to call a safety time out so that we can address concerns before proceeding." Among the situations the bulletin identifies as appropriate for a safety stop are if a procedure was new or nonstandard, as well as if the procedure has the potential for causing injury or harm. The bulletin also states that the Respondent will not take any punitive actions against employees for stopping a job. The bulletin contains a screenshot of the Respondent's electronic stop report. Among other things, the computer form asks the employee to "[d]escribe the situation and why a stop was called," as well as "[w]hat was done to resolve the issue(s)." Employees can submit the safety stop form electronically.

[5] GC Exh. 15.

B. The Events of November 4 Leading to the Respondent Sending Topor Home and Placing Him on Administrative Leave

The Respondent's "Penex" machine plays a central role in the events giving rise to Topor's suspension. In layman's terms, the Penex unit performs multiple refining functions, utilizing a catalyst to produce necessary chemical reactions. The Penex machine is shut down once every 5 years or so for maintenance. When maintenance is completed, the unit must be restarted. The Respondent documented how to perform the restart in its "PEXEX Startup with Reactors Bypassed" procedure. The Respondent uses the term "procedure" to denote a written document detailing the steps which must be followed to safely perform a work task. Once a procedure has been established, any change to it requires a written procedure step change form (the "step change form.") The changes must be signed off on by three individuals, including supervisors and employees in "tech service," the department which provides technical support and assistance to the refinery's operating units.[6]

The last time the Respondent shut down and restarted the Penex was several years ago. Topor was the leader on that job. One of the tasks he performed was to inject hydrochloric acid (HCl) from a cylinder into the Penex unit. This step is done to remove moisture from the machine, which otherwise would damage the catalyst in the unit upon its restart. To inject the acid into the Penex, the pressure in the cylinder containing the acid must be higher than the pressure in the Penex. When he previously performed this function, Topor placed an HCl cylinder on top of a scale, insured that the pressure in the cylinder was higher than the Penex, then opened up the cylinder valves so that the acid would flow into the Penex. The scale enabled Topor to monitor how much acid had been injected into the unit. He injected multiple cylinders of HCl into the Penex using this method, without incident. When doing so, Topor did not utilize heat or steam. The method by which Topor performed the HCl injection conformed to the Respondent's then existing procedure.

In September, the Respondent again initiated the Penex turnaround process. The shutdown of the machine occurred that month and then, in the middle of October, the startup process began. The first HCl injection from a cylinder to the Penex took place on October 31. This time, though, the Respondent utilized a somewhat different process to perform the acid injections than the one Topor had the last time the operation occurred. To increase the pressure in the HC1 cylinder above that in the Penex, a water bath was utilized. An operator would fill a steel bucket with water, place an acid cylinder inside the bucket, then use a hose to point and deliver steam to the outside of the bucket. The steam heated the water inside the bucket, thereby increasing the temperature and pressure in the HC1 cylinder. The operator also was required to monitor the temperature of the HCl cylinder wall, using a temperature gun. That gun was pointed at the cylinder to get a temperature reading. The target temperature was between 110 and 120 degrees. The maximum temperature which could not be exceeded was 125 degrees. Corey Freymiller, then the Respondent's supervisory maintenance planner in the

[6] GC Exh. 7. Hereinafter when the word "procedure" appears in this decision, it conforms to the Respondent's use and definition of the word in its refinery operations.

reformer, oversaw the Penex turnaround process in the fall of 2016. In addition, Eric Rowe, a unit process engineer in the tech service department who has a chemical engineering degree, provided technical support and assistance for the process. Rowe's position is nonsupervisory, but not in the bargaining unit. From October 29 to November 2, certain operators successfully injected multiple HCl cylinders into the Penex using the heated water bath. However, the Respondent's procedure was not yet updated to reflect this revised method.

1. Topor and Rennert's request for a step change form

The work morning of November 4 began as usual with the Respondent's "toolbox," or staff, meeting in the satellite to discuss the work of the day. A crew change occurred that morning and Topor returned to work after a 3-day absence. Prior to the meeting, Freymiller told Caswell that he wanted the last bottle of HCl injected that morning by 9:30 a.m. He also told Caswell that he and Rowe would come out and help with any issues, given that it was a new crew working that day. Then at the toolbox meeting, Caswell assigned Rennert the task of injecting the HCl. Rennert had not previously performed this task during his career. After the morning meeting ended, Rennert and Topor met at the Penex unit to discuss the job. Topor did not see a scale there, which he used the last time he injected HCl. Rennert asked Topor if he thought it would be safe to steam a compressed gas cylinder. Topor told him no, that he had never heard of that being done before. He told Rennert to call Caswell and ask for a procedure. Rennert did so. Caswell told him he was not aware of a procedure and would be right down. At approximately 9:30 a.m., Freymiller, Rowe, Caswell, Rennert and utility operator Jacob Johnson met and spoke at the Penex unit. Rennert told them he did not know how to perform the job, so Freymiller, Caswell, and Rowe demonstrated how to do it. Rennert then stated he was all right with it.[7]

However, by 10:30 a.m., the HCl injection still had not been completed. Despite his earlier assurance, Rennert remained concerned about the safety of the job, in particular whether heating the acid cylinder could result in an explosion. Rowe went to the satellite to check on the status and spoke with both Rennert and Topor about the steaming process. The three reviewed a written report prepared by a company called UOP, which manufactures the Penex unit.[8] Topor and Rennert then raised specific concerns with Rowe, who took notes of their discussion.[9] The concerns included whether a personal protective suit with respiratory gear (PPE) needed to

[7] The findings of fact in this paragraph are based on the testimony of Caswell (Tr. 170–172, 181–184), Freymiller (Tr. 603–605), Rennert (Tr. 78–80, 115–119), Rowe (Tr. 491–493), and Topor (Tr. 262–263, 268–270). On material points, their testimony contained no contradictions. To the extent a credibility determination is required, I credit Topor's testimony with respect to his discussions with Rennert at the Penex. His recall was thorough and detailed and his demeanor was indicative of reliable testimony. As to the discussions at the Penex unit, I credit Caswell's account, given that he exhibited the strongest recall of the discussion there. Moreover, his testimony was largely corroborated by his and Freymiller's subsequent statements provided during the Respondent's investigation into Topor's November 4 conduct. (R. Exhs. 13 and 14.)

[8] GC Exh. 6.

[9] R. Exh. 9.

be worn; how to execute the water bath with the steel bucket to heat the cylinder; how to monitor the pressure of the cylinder so that the HCl would inject into the Penex unit; and how to monitor the temperature in the cylinder. Topor stated it would be impractical to try and heat the water in the bucket while wearing PPE. Rowe responded that they were supposed to use a steam hose to heat the water. Topor also questioned the accuracy of cylinder temperature readings from a temperature gun, which both Topor and Rennert felt did not provide consistent readings. Following this discussion, Topor asked for a procedure on how to do the job. Rowe then went to work on writing a step change form to the Respondent's existing procedure.[10]

At 1:30 p.m., Rowe met with Freymiller and Brianna Jung, the Respondent's operations superintendent in the reformer area. The three reviewed Rowe's draft step change form, made certain changes to it, and ultimately signed off on the new process for heating the HCl cylinder. The first step of the revised procedure stated: "Verify other HCl cylinders are not in the area near the HCl cylinder that will be heated."[11]

2. The disagreement between Topor and his supervisors

Between 3 and 3:30 p.m., Topor observed Jung and Regenscheid outside the satellite. Regenscheid called him over, told Topor he had a job for him, then handed him the step change form.[12] Topor asked the two to go into the satellite, so he could read the form. They did so. At that point, Rennert and employees Joshua Johnson and Duke Morales also were present. Topor began reviewing the document. When he read the first step about verifying that other HCl cylinders were not "in the area," Topor said he had a concern, because there were multiple cylinders out in the unit and they needed to move them. Regenscheid then left the satellite to look at the unit. Topor asked for a copy of the safety data sheet (SDS) for HCl, which describes the hazards of that chemical and how to use it safely.[13] Johnson and Morales were on the computers, so Johnson told Topor he would look up the SDS. Jung then went to assist Johnson with that process, although they never obtained the SDS that day. Regenscheid returned to the satellite and told Topor he wanted to mitigate the hazard by putting insulation blankets around the cylinders not being used. Topor countered that the procedure said the cylinders have to be taken out of the unit. He then said he did not think Regenscheid's proposal was safe and he wanted to do a safety stop. Regenscheid repeated that Topor should use insulation to mitigate the hazard and Topor repeated that he was calling a safety stop and wanted to call the safety department down to see if it was safe. Topor and Regenscheid were both speaking loudly

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[10] These findings of fact are based on Topor's testimony, which I credit. (Tr. 270–277.) Again, Topor was thorough and detailed in his account. In contrast, both Rennert (Tr. 120–123) and Rowe (Tr. 494–501) exhibited spotty recall when testifying about the conversation. Nonetheless, to the extent they did remember, the testimony was consistent. Moreover, Topor's testimony is corroborated by the contemporaneous notes taken by Rowe. (R. Exh. 9.)

[11] GC Exh. 14.

[12] The record evidence does not make clear why Regenscheid decided to assign this task to Topor now, instead of Rennert.

[13] GC Exh. 8.

during this exchange. At that point, Jung and Regenscheid left the satellite. Topor got on a computer and began filling out the safety stop paperwork.

As Jung and Regenscheid walked to the Penex, they discussed whether they should send Topor home if, as they perceived, he continued to be unwilling to engage in a conversation about mitigating his safety concerns. Jung told Regenscheid they needed to consider doing so under those circumstances. At the Penex, Regenscheid explained to Jung his insulation blanket suggestion. Jung then called Topor on her radio to get him out to the unit. Her first two radio calls to him spanned 16 seconds. Topor responded 13 seconds after Jung's second call. She asked Topor to come out and take a look. Topor responded that he first was going to put in the safety stop information and call safety, then would be right out. At that point, Regenscheid got on the radio and told Topor personnel were working on this. He added that Topor should come out and look at it now. Topor again responded he was doing the safety stop first and Regenscheid repeated he should come out. Topor then asked if Regenscheid did not want him to fill out the safety stop information. Regenscheid responded that he could do it later on.

Topor then met Jung and Regenscheid at the Penex. He pointed to the multiple bottles in the cage and said the procedure stated they have to remove the additional bottles. He added that, if they were going to do something else, it would require a step change to the step change form they just did. Regenscheid again responded that they could mitigate the hazards by putting insulation around the cylinders. Topor told them he called a safety stop because he felt the job was unsafe, they were pressuring him to do the job, and they were refusing to follow the safety stop process. He said he wanted safety down there. At that point, Regenscheid looked at Jung and said, "Can I?" When Jung responded yes, Regenscheid told Topor he needed to get his stuff and go home, he was done for the day. Topor started walking away and heard Regenscheid call him. However, he continued on to the satellite, because he did not want the situation to escalate any further. Regenscheid asked Topor for the step change form back, but Topor did not hear the request. Regenscheid later drove Topor from the satellite to a building where he could change clothes. The two did not speak during that ride. Later that same day, Topor left Kerntz a voice message. He told Kerntz he had called a safety stop and two supervisors were pressuring him to do a job he felt was unsafe and refused to allow the stop process. He identified Jung and Regenscheid as the supervisors.[14]

[14] The findings of fact in this section (II.B.2) are based upon Topor's testimony (Tr. 280–291, 320–331, 339–342), which I credit. I discuss this credibility resolution in greater detail below in section II.E, including the Respondent's contentions that Topor twice pointed his finger at Regenscheid and refused to return the step change form to Regenscheid. For now, I note that, on most critical points, witness testimony did not conflict concerning the discussions that afternoon. In addition to Topor, Jung (Tr. 405–420), Regenscheid (Tr. 555–568), Joshua Johnson (Tr. 140–148), Morales (Tr. 203–206), and Rennert (Tr. 83–86, 90–91) testified in this regard. The witnesses all agreed that Topor expressed concern about other cylinders being in the area of the one being heated and wanted the other cylinders moved. They also concurred that Regenscheid repeatedly asked Topor to mitigate the problem with insulation blankets and Topor stated multiple times in response that he was calling a safety stop. Finally, the witnesses agreed both individuals were speaking loudly at each other during the conversation.

C. *The Respondent's November 14 Suspension of Topor*

That same afternoon after sending Topor home, Jung contacted Whatley, the manager of operations and her supervisor, and reported what happened. Whatley advised her they would have to conduct an investigation and she, Regenscheid, and Rowe needed to document what occurred. He told her to call Christa Powers, a human resources generalist for the Respondent, tell her what happened, and ask her if there was anything else they needed to do that night. Jung then called Powers, who told Jung to write up a statement of what she remembered. Powers also told her to obtain statements from Regenscheid, Rowe, Freymiller, and Caswell.[15]

Almost immediately thereafter still on November 4, Jung and Regenscheid wrote up accounts of their afternoon discussions with Topor.[16] Regenscheid began his by stating, "[t]his pertains to issues with Rick Topor refusing to do assigned work." He acknowledged Topor's request for a safety representative on sight and stated Tim Olson, an emergency response technician, had been called ahead of time and was there. Regenscheid concluded by saying "I feel that [Topor] utilizes safety stops and procedures to not have to perform work and takes no initiative to correct the issue if it causes work for him. I also feel [Topor] was being insubordinate to me by refusing to do the work to correct the issue." At 4:07 p.m., Regenscheid emailed his one-paragraph statement to Jung. About an hour and a half thereafter, Jung emailed her statement to Powers, with Regenscheid's statement attached to it. Jung stated that she chose to send Topor home because he was "unwilling to discuss with [Regenscheid] and I the mitigation and work through the potential options to inject the HCl in the system, which is viewed as insubordination." Jung also included the names of other individuals who were present both in the satellite and in the field. In addition to Olson, Jung identified Brian Bestler, Jacob Johnson, and Rennert as having been in the satellite. She also identified Olson and Rennert as having been in the field. At 5:39 p.m., Kerntz sent an email to Jung, cc'ing Whatley, Powers, and Regenscheid, asking if it made sense to place Topor on administrative leave to allow them to investigate further. At 6:09 p.m., Jung responded that she agreed with that move. Jung did not work the next 2 days.

On Saturday, November 5, Rennert returned to work. Early that morning, Regenscheid told him he wanted to go out and take a look at the HCl cylinder and see if they could heat it up and get more out of the cylinder into the system. Rennert responded: "To be honest with you

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[15] The General Counsel's complaint alleges that Powers was the Respondent's Section 2(11) supervisor and 2(13) agent. The Respondent denies the allegations in its answer. The Board applies the common-law principles of agency in determining whether an individual is acting with apparent authority on behalf of an employer, when that individual makes a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). At the hearing, Kerntz testified that the duties Powers performed related to the investigation into Topor's conduct were "within the authority of her responsibilities" for the Respondent. (Tr. 25.) The record evidence also establishes that Powers directed Jung to provide her own statement and obtain others as part of the investigation. She was present and took notes during all of the investigatory interviews. Thus, I find that Powers actions during the investigation of Topor were made as the Respondent's 2(13) agent.

[16] R. Exh. 11.

Gary, this scares the crap out of me and I don't want to do it, but if you are going to do the same thing to me that you did to Rick, then I will do it." The two proceeded to the Penex unit, where Rennert again said he did not want to do it. Regenscheid then told Rennert not to worry about it. Rennert was not disciplined as a result of this interaction.[17]

On the morning of Monday, November 7, Jung returned to work and spoke with Kerntz and Powers about what happened the previous Friday. Thereafter, Jung sent the two an email modifying her prior statement. Jung added the following language, portions of which are italicized here for emphasis:

> As we were searching for the HCL SDS, [Gary Regenscheid] came back into the satellite. He told [Rick Topor] that they could use insulation blankets to mitigate the situation. Rick said he would follow the procedure and wanted them moved. Gary again told Rick that he should use insulation blankets to mitigate the situation and—*It was at this point that Rick turned around and stood up in Gary's face and pointed at Gary and loudly* said he was calling a safety stop. "Rick said he was calling a safety stop." *Gary loudly stated the following to Rick*—Gary then told Rick that he could move the other 3 cylinders to the opposite of the cage and put an insulation blanket between the cylinders to mitigate the situation and Rick *again was standing and pointing at Gary and stated the following*—"Rick said he was not doing anything until safety comes down and looks at the situation and he was calling a safety stop because he did not feel it was safe."

In the original version of the email, Jung highlighted the last three sentences in this text with different colors.[18]

Also on November 7, Kerntz began his investigation into Topor's conduct. By that time, Jung, Regenscheid, Caswell, Freymiller, Rowe, and Olson all had provided written statements.[19] Kerntz decided to interview all of those individuals except Freymiller, plus Topor. He did not interview Rennert, Bestler, or Jacob Johnson, despite their being included on Jung's list of potential witnesses. He also did not end up interviewing Joshua Johnson or Morales. Powers attended the interviews and took handwritten notes.

On November 9, Kerntz interviewed Topor. Two union representatives and Powers also were present. At the start of the interview, Kerntz asked Topor to give his version of what

[17] Tr. 89–90, 441–442.

[18] GC Exh. 26.

[19] R. Exhs. 11, 13–15. The Respondent introduced all of these statements into the record except for Olson's, a conspicuous absence. Jung's original emailed statement included, next to Olson's name as a witness, that a "copy of his recollection of the situation [is] attached." However, it was not introduced into evidence. Olson also did not testify at the hearing.

occurred that day. At some point, Kerntz asked him if he had pointed and raised his voice loudly to Regenscheid. Topor stated he would never do that to a supervisor. When Kerntz asked if Jung and Regenscheid asked Topor to come out and mitigate the situation, Topor responded that he was calling a safety stop. Topor kept repeating that response to Kerntz. Kerntz asked Topor if he refused to return the step change form, after Regenscheid told him to give it back. Topor denied doing so, but admitted he had the form at home. Topor also initially denied speaking to Rowe that day, but immediately corrected the response to say he did and it was a short conversation.[20]

On November 10, Powers emailed a final "incident investigation" report to Whatley and Richard Hastings, the Respondent's refinery manager and Whatley's superior.[21] Whatley had left on vacation on November 5 and did not return until November 14. The report detailed the accounts of the events provided by Regenscheid, Jung, Olson, Rowe, Topor, and Caswell. For Olson, the report first stated that Olson was in the satellite when Regenscheid returned from the field. It then detailed Olson's recollection of the conversation: "When Gary returned he stated loudly 'Nope this is how we can mitigate, by using an insulated blanket.' Rick said, 'No, follow the procedure.' Rick then called a safety stop and wanted to get safety involved." The report then included a second entry regarding a follow-up call with Olson. That note stated: "Asked Tim if he witnessed Rick getting loud and pointing his finger at Gary. Tim said he did not see this occur. It could have happened after he left. Tim left the control room before Gary and Briana." The report's "Investigation Conclusion" section stated in full:

> The evidence in this case supports that Mr. Topor failed to follow his supervisor's instructions and/or directives on multiple occasions during his shift on Friday, November 4th. This conclusion is drawn despite Mr. Topor's claim that he was exercising his right to use the Safety Stop Process. The facts show that multiple efforts were made throughout the shift to address Mr. Topor's safety concerns, and yet he refused to cooperate when confronted by Operations Superintendent Briana Jung and Supervisor Gary Regenscheid.
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> Witnesses testified that Mr. Topor was insubordinate towards Supervisor Gary Regenscheid while in the Reformer Satellite. More than one witness observed Mr. Topor abruptly get out of his chair, raised his voice loudly at Gary while pointing at his face and stating that he was going to fill out a safety stop process prior to discussing the issue further.

[20] I address the Respondent's contention that Topor lied during this investigatory interview in the credibility section (II.E) below.

[21] GC Exh. 25.

> Furthermore, Mr. Topor was not truthful during the investigation process. Specifically, Mr. Topor denied that Process Engineer Eric Rowe spent extensive time reviewing details of the UOP Step Procedure with him after he (Topor) asked for further clarification of the operating procedure. Mr. Topor also denied the allegation that he loudly raised his voice and pointed at a Supervisor while in the Reformer Satellite. Mr. Topor denied the allegation that he outright refused to discuss the situation, and denied that he failed to comply with Supervisor Regenscheid's instruction to return the step change paperwork to him prior to leaving the property.

When Whatley returned on November 14, he discussed the situation with Kerntz. Whatley determined that Topor would be given an unpaid suspension for time served to that date and a final written warning. In a meeting with Topor that same day, Whatley delivered the news to him. The written disciplinary form[22] given to Topor stated in relevant part:

> REASON FOR CONFERENCE:
> On Friday, November 4, 2016 you were suspended for the balance of your shift for inappropriate behavior and insubordinate conduct towards your Supervisors. You were then placed on an administrative leave pending further investigation of the incident.
>
> The investigation revealed that you violated several company rules and/or policies while working on Friday, November 4th. Specifically, you have been cited for the following:
>
> > –Failure to follow instructions and/or directives on several occasions throughout your shift during which you refused to discuss mitigation steps as directed by your supervisors to formulate solutions relative to tasks that you were assigned.
> > –Insubordination when you raised your voice and pointed at a supervisor while in the Reformer Satellite.
> > –Unauthorized removal of Company property when you failed to return the step change paperwork to your supervisor after being instructed to do so.
> > –Failure to be accurate and truthful when questioned during the investigation.

Until November 2016, the Respondent never had disciplined Topor during his 13-year career.

[22] GC Exh. 17.

Article 17 of the collective-bargaining agreement between the Respondent and the Union sets forth certain offenses that "will result in discharge on the first offense regardless of past work record and standing in discipline process." The list includes insubordination, defined as a failure to follow a direct work order, and dishonesty. The Respondent's "Work Rules" applicable to union employees similarly contains a list of offenses serious enough to warrant immediate discharge without regard to an employee's past record or progressive discipline.[23] The list includes insubordination, dishonesty, and unauthorized removal of company property. The specific example of insubordination provided in the rules is failure to follow supervisory instructions or perform assigned work. The Respondent considered terminating Topor, but decided not do so because of his tenure at the refinery and lack of prior discipline.[24]

On November 16, Topor filed a complaint with the Occupational Safety and Health Division (MNOSHA) of the Minnesota Department of Labor and Industry. The complaint alleged that the Respondent discriminated against him for exercising his rights under the Minnesota state occupational safety and health law. On June 22, 2017, MNOSHA sent Topor a letter stating: "The investigation has produced evidence more persuasive in your favor and accordingly, the Department has determined that your rights under the OSHA Act were violated and your complaint has merit." The letter also indicated the department would notify the Respondent of the "decision" and seek a settlement in which Topor's suspension would be removed from his personnel file and he would be compensated for the time suspended.[25]

D. The Respondent's Denial of a Quarterly Bonus to Topor

Roughly 3 months after Topor's discipline, the Respondent denied him a quarterly bonus. Pursuant to the Respondent's bonus policy for bargaining unit employees, payouts are made quarterly based upon an evaluation of performance metrics. Employees who are disciplined face reductions in their potential bonus. For a final written warning or suspension, the policy calls for a 100-percent reduction. Because Topor was issued a final written warning and 10-day suspension on November 14, the Respondent denied him a quarterly bonus in January 2017.[26]

E. Witness Credibility

As previously noted, my findings of fact above are premised, in part, on the resolution of three significant credibility disputes. I now will discuss those resolutions in detail.

Credibility determinations require consideration of a witness' testimony in context, including demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the

[23] R. Exh. 26.

[24] Tr. 687–689.

[25] GC Exh. 19.

[26] R. Exh. 20; GC Exhs. 5 and 18.

allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

Two disputes involve the discussions between Topor, Jung, and Regenscheid on the afternoon of November 4. As to the overall testimony regarding these discussions, I found Topor to be a believable witness. His testimony was consistent and his demeanor confident, even when challenged extensively during cross-examination. Topor occasionally was nonresponsive to questions, but that lone factor is insufficient to render his testimony untrustworthy, especially where Rennert, Joshua Johnson, and Morales corroborated it. In contrast to Topor, Regenscheid's demeanor was hesitant when testifying about these discussions. He also acknowledged a lack of full recall and provided rapid, abbreviated responses to many questions on direct. Furthermore, inconsistencies between the testimony of Jung and Regenscheid detracted from their credibility. These included which of the two was speaking with Topor in the satellite and whether Regenscheid and Topor disagreed over the need to move the cylinders out of the area before Regenscheid left for the Penex the first time. Jung's testimony also was elicited with many leading questions and she frequently hedged her responses with qualifiers.

The first specific credibility dispute is whether Topor pointed his finger in the face of Regenscheid during their discussion in the satellite on November 4. Jung (Tr. 411–412) and Regenscheid (Tr. 562–563) testified that he did so while standing and his finger was within 6 inches to 2 feet of Regenscheid. However, Topor denied this occurred. (Tr. 297–298). I credit Topor's denial, because it was corroborated by Joshua Johnson (Tr. 147–148) and Morales (Tr. 206). Joshua Johnson was present for the entire interaction in the satellite and it appears Morales was present at the point when the supervisors allege Topor pointed at Regenscheid. Both are current employees and Morales has worked for the Respondent for almost 2 decades. They have no interest in this proceeding and no potential source of bias was identified at the hearing. The Board has long recognized that testimony by current employees which contradicts employer statements "is apt to be particularly reliable," because such employees are testifying directly against their pecuniary interests. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 10 (2016). I also found Johnson's demeanor when testifying about the events in the satellite to be assured and his responses forthright, including on cross-examination. The Respondent did not produce a neutral witness who saw Topor point his finger at Regenscheid, despite other employees being present in the satellite when this allegedly occurred. Moreover, multiple factors detract from the claim made by Jung and Regenscheid. First, neither supervisor stated that Topor pointed his finger at Regenscheid in their initial statements written that same day. (R. Exh. 11.) Although Jung later amended that account on her next workday (R. Exh. 12), Regenscheid never supplemented his statement. Finally, Jung highlighted portions of her revised statement in different colors, but could not provide an explanation for why she did this at the hearing. (GC Exh. 26; Tr. 436–438.) I view this lack of recall as inherently improbable, suggesting she did not want to disclose the actual reason for it and doing so would

not have helped the Respondent's case. On this record, I conclude that Topor did not point his finger at Regenscheid during the initial discussion in the satellite.

For these same reasons including witness demeanor, I do not credit Regenscheid's testimony claiming that Topor pointed his finger at Regenscheid a second time that same afternoon. (Tr. 568.) Regenscheid testified that, after he drove Topor back to the main control room, Topor pointed his finger at Regenscheid as Topor exited the vehicle and told Regenscheid he was going to HR and filing harassment charges against Regenscheid. In contrast, Topor testified that the two said nothing to each other during the ride. (Tr. 290, 341–342.) Regenscheid's claim of a second finger pointing appears nowhere in his or any other witness' contemporaneous statement. In addition, Topor did immediately call Kerntz and reported his disagreement over the supervisors' handling of the safety stop request. Yet he did not file any harassment complaint against Regenscheid, at that or any subsequent time. I also do not credit Jung's testimony that she informed Whatley on November 4 that she sent Topor home, in part, due to his actions towards Regenscheid, presumably including the finger pointing. (Tr. 420–421.) Again, that claim appears nowhere in Jung's statement written that same afternoon. What is clear from the supervisors' testimony as affirmed by their contemporaneous statements is that the decision to send Topor home was based upon his calling of a safety stop and refusal to discuss mitigation with them until an independent safety representative evaluated the situation.

The second credibility dispute concerns whether Topor refused Regenscheid's request that Topor return the step change form, after Regenscheid told him to go home. Jung (Tr. 419–420) and Regenscheid (Tr. 567) testified that Topor did so, while Topor (Tr. 289–290, 297–298) denied hearing the request. Topor specifically testified that he heard Regenscheid call for him after he started walking away, but nothing more. He stated he had a copy of the step change form in his back pocket. In contrast, Regenscheid testified that, when he told Topor to go home, Topor was holding a copy of the step change procedure form in his hand. Regenscheid asked Topor for the form back, so he could put it in the procedure book. Regenscheid held out his hand for the form. Topor then folded the form, said no, and began walking to the satellite. Jung corroborated Regenscheid's testimony on all material points. I resolve this conflict by relying on the testimony of the only neutral witness to hear this part of the conversation—Rennert. (Tr. 86.) Rennert testified that he heard Regenscheid ask Topor for the form back, but Topor was 20 yards away from Regenscheid at the time and there was a lot of noise in the area. When providing this testimony which corroborated Topor's account, Rennert exhibited the same confidence and reliable demeanor as he did throughout the hearing. In addition, the Respondent did not challenge Rennert's testimony on this point during cross-examination. Finally, Jung's and Regenscheid's contemporaneous statements again made no mention of Topor refusing to return the step change form. Therefore, I conclude that Regenscheid asked Topor to return the step change form, but Topor did not hear the question.

The last significant credibility determination is whether Topor lied during the Respondent's investigatory interview of him. On first glance, this appears to be a straightforward analysis, because Kerntz was the only witness who provided specific testimony about that interview. (Tr. 679–685.) Kerntz testified Topor lied when he denied pointing his

finger at Regenscheid; denied refusing to give the step change form back; initially denied speaking with Rowe that day, but then changed his answer and stated they had a short conversation; and refused to directly answer if he had refused his supervisors' request to mitigate the situation, instead saying he called a safety stop.[27] On direct, Topor confirmed the interview occurred, but did not describe it. (Tr. 296–297.) Then during cross-examination when asked repeatedly whether he recalled Kerntz's questions and his responses, Topor largely answered that he did not. (Tr. 358–363.)

Nonetheless, although it is uncontroverted, Kerntz's testimony concerning his interview of Topor raised several red flags undermining its credibility. First, Kerntz did not appear to have strong recall and used qualifiers at times in his responses. The testimony was elicited with many partially leading questions containing reminders of discussion topics, rather than Kerntz identifying them in response to open-ended questions. Second, his testimony substantially mirrored, and in some cases was identical to, the question and answer write-up in the Respondent's investigative report, except that he left out parts that were not favorable to the Company. The most significant example of this concerns whether Topor denied pointing his finger and yelling at Regenscheid. Kerntz testified that Topor responded he would never do that to a supervisor, which Kerntz deemed to be nonresponsive. Kerntz then testified he asked Topor two more times and got the same response. But the report says that, when Kerntz asked him again, Topor flat out denied having done so. Third, the Respondent had an opportunity to present corroborating evidence, but did not do so. Powers was present for the interview and testified at the hearing, but not about this meeting. (Tr. 614–642.) Moreover, the record establishes that she was taking notes at the meeting, but the Respondent did not introduce those notes, as it did for the meeting where Topor was notified of his suspension. (R. Exh. 25.) Finally, Kerntz's demeanor when testifying on this topic was uncertain. The overall picture I was left with after this testimony was that Kerntz exaggerated Topor's alleged misconduct and details from the interview were missing.

With this backdrop, I will examine each of the alleged lies. Based upon my two earlier credibility determinations, I concluded that Topor did not point his finger at Regenscheid and did not refuse to return the step change form. Thus, his denials of those accusations in the investigatory interview were truthful. I likewise conclude that Topor did not lie by telling Kerntz he called a safety stop, when Kerntz asked him whether he refused his supervisors attempts to mitigate the situation. Although it may not be a direct answer to the question, Topor nonetheless was being truthful about what he actually said in response to his supervisors' request to mitigate the situation. In addition, by telling Kerntz he had called a safety stop, he indirectly conveyed that he refused their proposed mitigation. Finally, I find

[27] Kerntz also did not testify consistently in this regard. During counsel for the General Counsel's 611(c) examination, the only alleged lies Kerntz identified as bases for Topor's discipline were the ones dealing with the step change form and pointing a finger at Regenscheid. (Tr. 68–69.) Then on direct, Kerntz added that Topor allegedly did not give him a "straight answer" concerning whether Jung and Regenscheid called him on the radio. (Tr. 680.) However, the Respondent's investigatory report did not include that allegation in its conclusions as to how Topor lied. (GC Exh. 25.)

that Topor's initial denial of his conversation with Rowe was a dishonest assertion. However, he immediately corrected it and admitted they had spoken.

ANALYSIS

The General Counsel's complaint alleges the Respondent's adverse actions towards Topor independently violate both Section 8(a)(1) and (3). Those actions include putting him on administrative leave; issuing him a final written warning; giving him a 10-day unpaid suspension; and denying him a quarterly bonus.

I. THE RESPONDENT'S MOTION TO REOPEN THE RECORD

On October 19, 2017, following the hearing, the Respondent filed a motion to reopen the record. On October 24, 2017, the General Counsel filed a response opposing the motion and, on October 31, 2017, the Respondent filed a reply brief. The Respondent seeks to introduce written correspondence it received from MNOSHA, dated September 29, 2017. The letter confirms only that MNOSHA conducted a safety inspection of the Respondent's St. Paul Park facility on June 6, 2017, and the inspection resulted in no proposed citations. The Respondent also moves to introduce (1) an affidavit from Kerntz, in which he asserted the inspection related, in part, to the HCl injection process at issue in this case; (2) an affidavit from Scott Conant, the Respondent's safety supervisor, describing hearsay testimony he could provide of a conversation he had with a MNOSHA representative; and (3) an undated copy of MNOSHA's Referral of Alleged Safety or Health Hazards sent to the Respondent, indicating the agency received a complaint over the improper storage of HCl cylinders.

After the close of a hearing but prior to the issuance of a decision, Section 102.35(a)(8) of the Board's Rules and Regulations grants administrative law judges the authority to rule on motions to reopen the record. However, that section does not set forth the circumstances in which a judge should exercise that discretion. Such guidance is supplied by Section 102.48(c)(1) of the Rules, addressing how the Board evaluates motions to reopen the record following the issuance of a Board decision, as well as Board decisions interpreting that rule. The Board requires that any evidence sought to be adduced be "newly discovered," which does not include events that occurred after the violations in question. See, e.g., *Security Walls, Inc.*, 365 NLRB No. 99, slip op. at 7 (2017), citing *Harry Asato Painting, Inc.*, 2015 WL 5734974 (2015) and *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987). This is so, even though the text of Section 102.48(c)(1) identifies "evidence which has become available only since the close of the hearing" as a category which could be presented at a reopened hearing. Id. at 7 fns. 16–17. The section also requires the movant to show that the evidence it seeks to introduce would require a different result in the case.

The Respondent has not made either required showing. The MNOSHA letter is an event occurring after the close of the hearing, which does not qualify as newly discovered evidence. Furthermore, the Respondent makes no argument as to how the alleged fact of MNOSHA not finding a safety violation related to the storage of the HCl cylinders would affect the outcome in

this case. The Respondent has not put forth a defense premised upon Topor's safety concern being invalid. Accordingly, I deny the Respondent's motion to reopen the record.[28]

II. DID THE RESPONDENT'S SUSPENSION OF AND OTHER ADVERSE ACTIONS IMPOSED UPON TOPOR VIOLATE SECTION 8(A)(1)?

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. "[A] respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 979 (2007), quoting *Meyer Industries (Meyers I)*, 268 NLRB 493, 497 (1984). In this case, the General Counsel contends that Topor was disciplined in retaliation for his protected concerted activity on November 4.

A. The Appropriate Legal Framework

The first question which must be addressed in evaluating the General Counsel's Section 8(a)(1) allegations is what legal standard applies. The General Counsel argues Topor's conduct on November 4 was protected concerted activity and he did not lose the protection of the Act by engaging in opprobrious conduct. Therefore, the General Counsel analyzes the case using the Board's framework in *Atlantic Steel*, 245 NLRB 814 (1979). In contrast, the Respondent asserts that this case involves a dispute over its motivation for disciplining Topor. As a result, the Respondent analyzes the Section 8(a)(1) allegations pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Respondent also contends *Atlantic Steel* does not apply, because this case does not involve misconduct by Topor in his role as a union steward.

Wright Line applies to Section 8(a)(1) and (3) cases where an employer's motive for an adverse action is at issue. *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 1 fn. 3 (2015). In contrast, the *Atlantic Steel* framework applies to cases where no dispute exists that an employer took action against an employee, because of the employee's protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002). In such single motive cases, the only

[28] On December 8, 2017, the General Counsel issued a new consolidated complaint in Cases 18–CA–205871 and 18–CA–206697, both also involving the Respondent and Topor. The complaint alleges the Respondent, in August 2017 after the hearing in this case closed, unlawfully issued Topor adverse performance evaluations and, on September 21, 2017, unlawfully discharged Topor. These actions again are alleged as independent Section 8(a)(1) and (3) violations. Also on December 8, 2017, the General Counsel filed a motion to consolidate the new cases with this matter. Via separate written order, I denied that motion. As described in greater detail in the order, I found that granting consolidation was not appropriate, largely because it would result in an unacceptably long delay in the issuance of my decision in this case.

issue is whether the employee's conduct lost the protection of the Act. *Felix Industries*, 331 NLRB 144, 146 (2000). The situation here is akin to the one the Board faced in *Fresenius USA Manufacturing, Inc.*, 362 NLRB No. 130 (2015). In that case, a union supporter anonymously scribbled vulgar, offensive, and arguably threatening statements on several union newsletters, in an attempt to encourage employees to support the union in an upcoming decertification election. Following complaints about the statements, the employer conducted an investigation, during which it interviewed the employee who wrote the statements. The employee admittedly lied on two occasions, once during and once subsequent to his interview. The employer suspended and discharged the employee for both the statements and for dishonesty during the investigation. In finding those actions lawful, the Board applied *Wright Line*.[29]

This case is on all fours with *Fresenius.* Three of the reasons asserted by the Respondent for Topor's suspension arose out of Topor's conduct on November 4, which the General Counsel claims was protected. They were the failure to follow supervisory instructions to discuss mitigation of safety concerns; insubordination by Topor raising his voice and pointing his finger at Regenscheid; and unauthorized removal of the step change form. Had the Respondent's adverse actions been based only on these reasons, applying *Atlantic Steel* would have been appropriate. However, the Respondent's additional reliance on Topor's alleged unprotected conduct of lying during the investigation puts its motivation in dispute. Moreover, the Respondent does not concede that Topor engaged in protected concerted activity on November 4, and the General Counsel does not admit that Topor engaged in misconduct that day. Thus, I agree with the Respondent that *Wright Line* is the appropriate framework to apply. *Alton H. Piester, LLC,* 353 NLRB 369, 372 fn. 25 (2008) (where employer relied on events other than conduct that was protected, *Wright Line* analysis was proper).[30]

B. Wright Line Analysis

Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse action. In cases involving 8(a)(1) discipline, the General Counsel satisfies the initial

[29] The question of whether to apply *Wright Line* or *Atlantic Steel* often is a difficult one, as the case history in *Fresenius* makes clear. An earlier, three-member panel of the Board issued the original decision in the case and all three, including a dissenter, agreed that *Atlantic Steel* applied. 358 NLRB 1261 (2012). The Board then evaluated whether the employee's comments were so egregious as to cause him to lose the protection of the Act. The majority held that they were not. The majority also found that the employer could not rely upon the employee's subsequent dishonesty, because the employee was not required to respond truthfully to questions in the investigation that sought to uncover his protected activity. Id. at 1263 fn. 6. However, that decision was vacated due to the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), because two members of the Board panel were not validly appointed by the President. Following remand, an entirely different, three-member panel of the Board reconsidered the case de novo, applied *Wright Line*, and determined the employer's discharge of the employee for dishonesty was lawful.

[30] Neither party contends this case should be evaluated pursuant to *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

burden by showing (1) the employee's protected concerted activity; (2) the employer's knowledge of the concerted nature of the activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014); *Walter Brucker & Co.*, 273 NLRB 1306, 1307 (1984). If the General Counsel meets the initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even in the absence of the employee's protected activity. *Mesker Door Inc.*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the employer's action are pretextual–that is, either false or not in fact relied upon–the employer fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

1. Did Topor engage in protected concerted activity on November 4?

The General Counsel first asserts that Topor engaged in traditional protected concerted activity on November 4, by acting in concert with or on behalf of other employees about safety concerns. The "mutual aid or protection" clause of Section 7 guarantees employees "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). In order to find an employee's activity to be "concerted," the Board requires the conduct be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers II*, 281 NLRB at 887. Moreover, while no group action may have been contemplated, activity by a single individual is concerted, where the concerns expressed by the employee are a logical outgrowth of concerns previously expressed by a group. *Summit Regional Medical Center*, 357 NLRB 1614, 1617 fn. 13 (2011); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991).

The record evidence firmly establishes that Topor was engaged in protected concerted activity on November 4. That morning, Topor and Rennert discussed the safety of injecting HCl into the Penex using steam and a water bath to heat the HCl cylinder. Thereafter, the two employees raised their safety concerns with Rowe, leading to Topor's request for a procedure. In his initial conversation with Jung and Regenscheid in the satellite that afternoon, Topor read the procedure and raised an additional concern that other cylinders needed to be moved out of the area where the cylinder to be heated was located. The concerns resulted in Topor calling a safety stop and requesting that a safety department representative intervene. When the three later conversed at the Penex unit, Topor reiterated his desire to have the other cylinders

removed and repeated that he was calling a safety stop. Topor's expressions of safety concerns satisfies Section 7's requirement that his conduct be for mutual aid and protection. *NLRB v. Washington Aluminum Co.*, 370 U.S. at 14–15; *Daniel Construction Co.*, 277 NLRB 795, 795 (1985). His discussion with Rennert and Rowe in the morning obviously was concerted, since it involved multiple employees. Even though Topor individually stated his safety concerns in the afternoon, his expression was the logical outgrowth of the earlier discussions he had with Rennert and Rowe that morning about the safety of the job. *Dynatron/Bondo Corp.*, 324 NLRB 572, 585 (individual's refusal to wear dirty respirator she considered to be unsafe was concerted activity, because it was a logical outgrowth of earlier complaints by employees); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–1039 (1992) (individual employees' refusals to work overtime was concerted activity, because it was a logical outgrowth of group protest weeks earlier concerning a reduction in their work schedule).

In its brief, the Respondent essentially ignores whether Topor engaged in protected concerted activity at any point prior to or during his discussion with Jung and Regenscheid the afternoon of November 4. Instead, the Respondent focuses solely upon Topor's refusal to discuss mitigation efforts with the two supervisors and argues the refusal was not protected. I find no merit to this contention. Topor's refusal to discuss mitigation was intertwined with his calling of a safety stop. Although the Respondent tiptoes around this issue in its brief, Topor was refusing to work by doing so. Such a refusal in the face of a legitimate safety concern is protected concerted activity, irrespective of the fact that Jung and Regenscheid felt the job could be performed safely with insulation blankets. See, e.g., *Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002) (employees' refusal to perform work in apartment due to concern over asbestos exposure was protected concerted activity, notwithstanding their supervisors believing no such risk existed); *Burle Industries, Inc.*, 300 NLRB 498, 498 fn. 1, 503 (1990) (employee who urged other workers to leave work area if they felt ill due to chemical fumes was engaged in protected concerted activity, despite supervisors insisting work area was safe); *Brown & Root, Inc.*, 246 NLRB 33, 36–37 (1979) (pipefitters cutting and threading pipe 100 miles off the Mississippi shore engaged in protected concerted activity when they refused to work due to concern over using electrical equipment while it was raining, even though supervisors believed it was safe for them to return to work after the rain eased). In addition, I reject the Respondent's attempt to consider the refusal to discuss mitigation in isolation, which would require me to turn a blind eye to everything leading up to Topor's refusal. That action cannot be considered in a vacuum. *Emarco, Inc.*, 284 NLRB 832, 834 (1987); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586–587 (7th Cir. 1965). Rather, the sequence of events for the entire day must be considered. Topor engaged in protected concerted activity throughout the day, including his discussion with Rennert at 9:30 a.m. over their safety concerns with the job, his presentation with Rennert of those concerns to Rowe at 10:30 a.m., and his expression of an additional safety concern to Jung and Regenscheid at 3:30 p.m. The culmination of this protected activity was Topor's calling of a safety stop. His concomitant refusal to discuss mitigation with Jung and Regenscheid cannot be separated from that protected concerted activity.

For all these reasons, I conclude that Topor was engaged in traditional protected concerted activity throughout November 4.

The General Counsel also contends Topor's conduct was protected concerted activity, pursuant to the decisions in *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984) and *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Under *Interboro*, an individual's assertion of a right grounded in a collective-bargaining agreement is protected concerted activity, even where the individual is acting alone. When asserting the right, an employee need not be correct that a breach of the collective-bargaining agreement has occurred. The employee likewise need not file a formal grievance, invoke a specific provision of the contract, or even refer to the contract. The activity is concerted if the employee honestly and reasonably invokes rights which have been collectively bargained.

The determination of whether *Interboro* applies here begins with the contract language. As previously noted, the safety article in the parties' collective-bargaining agreement states in relevant part:

> Should any employee be of the opinion that an unsafe condition exists, it shall be their obligation to immediately inform their Company Representative of such fact and to that end the Employer will examine the facts so as to determine the safety factors and whether the job should proceed.

This plain language makes it an employee's "obligation" to report an unsafe condition. Without question, then, Topor exercised a contractual right when he repeatedly informed Jung and Regenscheid on the afternoon of November 4 of his opinion that performing the HCl injection with other cylinders in the area was unsafe. Even though he did that individually, the conduct constitutes *Interboro* protected concerted activity.

The remaining issue is whether Topor's calling of a safety stop and refusal to discuss mitigation likewise was *Interboro* protected. This is a tougher question, because the collective-bargaining agreement does not reference safety stops and the safety stop policy is not otherwise incorporated into the contract. The Respondent contends *Interboro* does not apply, pointing to the safety provision's lack of a right to refuse to work based on a safety concern. However, the Respondent cites to no case law supporting this argument and certain Board decisions run to the contrary. In *Wheeling-Pittsburgh Steel Corp.*, 277 NLRB 1388, 1389 (1985), the collective-bargaining agreement stated:

> An employee, who believes he is being required to work under conditions which are unsafe beyond the normal hazard inherent in the job, may notify his Supervisor who shall make an immediate investigation. If the employee is not satisfied with the results of the investigation, he shall be permitted to call to the job a Union safety representative.

Additional language in the provision was silent as to whether the employee could stop working until the safety representative arrived. The Board found that a single employee who was

suspended for refusing to work on a job the employee believed was unsafe until a union safety representative looked at it was engaged in protected concerted activity. 277 NLRB at 1388 fn. 2. The Board affirmed the judge's conclusion that this language gave an employee the arguable right to do so, even though the provision said nothing about the right to refuse to work. Similarly, in *Anheuser-Busch, Inc.*, 239 NLRB 207, 211 (1978), cited by the General Counsel, the contract provision stated:

> No employee shall be discharged or disciplined for refusing to work on a job if his refusal is based upon the claim that said job is not safe, or might unduly endanger his health, until it is determined by the Employer that the job is or has been made safe, or will not unduly endanger his health. Any dispute concerning such determination is subject to the grievance procedure.

The Board affirmed the judge's finding that this provision gave employees the arguable right to refuse to perform work, even after a supervisor deemed the job safe. Accordingly, a single employee there who refused to perform an assigned task he believed posed an explosion risk was engaged in *Interboro* protected concerted activity, despite a supervisor assessing the job to be safe.

In light of this precedent, I conclude that Topor's calling of a safety stop and refusal to perform the work until a safety representative inspected the job was protected concerted activity under *Interboro*. I find that Topor reasonably invoked a contract right when doing so. The parties' safety provision is silent as to the situation presented in this case, where Topor disagreed with his supervisors' assessment that the job could be performed safely. Admittedly, the provision states the Respondent was to determine if a job was safe and should proceed. But the provision in *Anheuser-Busch* also suggests an employee had to perform the job once the supervisor deemed it safe. Despite the language, the employee there engaged in *Interboro* protected concerted activity when he refused to perform a job, after the employer's representative deemed it safe. Moreover, just as here, the contract language in *Wheeling-Pittsburgh Steel Corp.* made no mention of employees being able to refuse to work. It only explicitly granted employee's the right to call a union safety representative. Nonetheless, an employee engaged in *Interboro* protected concerted activity by refusing to work until the representative arrived. Here, Topor insisted upon talking to a different company representative than Jung and Regenscheid concerning his belief the job they wanted him to perform was unsafe. The contract language reasonably could be construed to give him that right, since it does not identify which "Company Representative" to whom an employee is obligated to report a safety concern. It also arguably gave Topor the right to refuse to perform the job until his chosen representative inspected the job. Therefore, Topor's calling of a safety stop and request for a safety representative to inspect the job was protected concerted activity under *Interboro*.

Finally, the General Counsel also argues Topor engaged in "inherently concerted" activity on November 4 by asserting safety concerns in a dangerous industry. Employee discussions concerning two terms and conditions of employment–wages and job security–are

inherently concerted, and protected, regardless of whether they are engaged in with the express object of inducing group action. *Hoodview Vending Co.*, 359 NLRB 355 (2012), reaffd. 362 NLRB No. 81 (2015). However, the Board, as yet, has not ruled that safety discussions constitute inherently concerted activity. The Board's rationale for finding discussions about wages and job security inherently concerted was that the topics are vital terms and conditions of employment and the "grist" of which concerted activity feeds. However, that description could apply to any number of additional terms and conditions of employment. Certainly safety, health insurance, and retirement benefits might all be deemed vital. Yet, some boundary must exist on the universe of working conditions important enough to come under the inherently concerted umbrella. For this reason, I conclude any expansion of the doctrine is better suited for the Board itself and I decline to find Topor engaged in inherently concerted activity.[31]

2. Did the Respondent harbor animus towards Topor's protected concerted activity?

The Respondent does not contest its knowledge of the concerted nature of Topor's activity.[32] Therefore, the final question as to the General Counsel's initial burden is whether the Respondent harbored animus towards the activity. Animus can be demonstrated by direct

[31] If *Atlantic Steel* had been applicable to this case, I would find that Topor's conduct on the afternoon of November 4 was not sufficiently egregious to lose the Act's protection. By and large, this result is due to my findings that Topor did not engage in much of the misconduct alleged by the Respondent. His calling of a safety stop and refusal to discuss mitigation was protected concerted activity. Topor did not point his finger at Regenscheid and did not hear Regenscheid's request for the step change form. That leaves only Topor speaking in a loud voice to Regenscheid. The first *Atlantic Steel* factor looks to the place of the discussion, which I find favors protection. The conversation took place in the satellite, a meeting and break area. No disruption to the Respondent's operations occurred. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Although a limited number of other employees were present, conversations between supervisors and employees over safety concerns were commonplace at the refinery. Therefore, hearing such a discussion, even if it was loud, did not undermine supervisory authority. The subject matter of the discussion factor also favors protection. Topor's comments addressed employee safety in a facility with a much higher degree of risk than a typical workplace. The safety of employees operating in a dangerous industry goes to the heart of the Act's concerns. The third factor, the nature of the outburst, also favors protection. Topor did not use profanity, threaten Regenscheid, or make any threatening physical movement. An employee's brief, verbal outburst weighs in favor of protection. *Kiewit Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). Topor may have been loud, but Regenscheid was as well. I also note, when he testified at the hearing, Topor's normal tone of voice was robust. A raised voice in these circumstances is understandable. In any event, speaking loudly (or angrily pointing a finger at a supervisor, had Topor actually done so) does not result in an employee losing the Act's protection. *U.S. Postal Service*, 360 NLRB 677, 683 (2014); *Syn-Tech Window Systems, Inc.*, 294 NLRB 791, 792 (1989). The final factor does not favor protection. Topor's alleged misconduct was not provoked by an unfair labor practice. Overall, then, three of the four *Atlantic Steel* factors weigh in favor of protection. Therefore, I conclude that Topor did not lose the protection of the Act on November 4 by speaking too loudly to Regenscheid.

[32] The record evidence establishes this knowledge. Both Topor and Rennert expressed concerns to their supervisors about the safety of heating the HCl cylinder. Then during the investigation, Rowe

evidence or inferred from the totality of the circumstances. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993). A discriminatory motive may be established by a variety of circumstantial factors, including the timing of the employer's adverse action in relationship to the employee's protected activity, as well as whether the asserted reasons for the adverse action are a pretext. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Shambaugh and Son, L.P.*, 364 NLRB No. 26, slip op. at 1 fn. 1 (2016). Pretext may be demonstrated by asserting a reason that is false and by an indifferent or inadequate investigation into the alleged misconduct. *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 1 fn. 4 (2015).

Applying these principles here, I conclude the Respondent harbored animus towards Topor's protected activity. First and foremost, the Respondent sent Topor home and put him on administrative leave on November 4, due to his calling of a safety stop and refusal to discuss mitigation that afternoon. Without question, the Respondent was hostile towards the conduct, since it sent Topor home as a result of it. This direct link alone is sufficient to sustain the General Counsel's initial burden. Although the supervisors viewed Topor's conduct as insubordination, it actually was protected activity under the law.

Nonetheless, a discussion of the Respondent's inadequate investigation also is warranted, since it likewise provides strong support for an animus finding. At the point he concluded his interviews, Kerntz had conflicting accounts from the supervisors and Topor concerning whether Topor pointed his finger at Regenscheid and refused to return the step change form to him. He had one neutral employee, Olson, who said he never saw Topor point his finger at Regenscheid. He also had Jung's statement identifying Rennert and three other employees as being present either in the satellite or in the field for the interactions between Topor and his supervisors. Despite the dispute from the conversation participants as to what occurred and other potential avenues of investigation, Kerntz simply credited the supervisors' versions. In particular, the failure to interview Rennert, whom Jung had identified as being present both in the satellite and at the Penex, stands out as something that defies explanation. During direct examination, Kerntz's unconvincing explanation for this backs that conclusion:

> Q: Did you interview any bargaining unit people, other than Mr. Topor?
> A: We did not.
> Q: Is there a reason?
> A: Well, we evaluated and contemplated. When we do investigations, we look at several things, and we contemplated whether it would make sense to interview bargaining unit people in this particular case. Based on the facts, we decided

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submitted a statement to management setting forth in detail his discussion with Topor and Rennert about their safety concerns. The Respondent had this knowledge prior to its decisions to suspend Topor, issue him a written warning, and deny him a quarterly bonus.

> that there wasn't relevant information, that they weren't pertinent to the discussions that were had.

Then on cross-examination, Kerntz attempted to claim no awareness of other potential witnesses to Topor's conduct, despite having received Jung's statement identifying them:

> Q: In fact, no one said that they [saw] Mr. Topor point or get loud at Mr. Regenscheid, except for Briana Jung and Gary Regenscheid, isn't that right?
> A: I don't think anybody else was—to our knowledge—was present, so—in part of that discussion, so I can't really answer that. What I do know is those two were.
> Q: You didn't know Mike Rennert was present?
> A: No. That they were part of that discussion, they may have been in the vicinity, but wasn't aware that they were in that part of that discussion.

When confronted with Jung's email, Kerntz stated:

> So it says, "Others present outside of Rick Topor, Gary Regenscheid, Briana Jung who were present at both locations." And that in the satellite, it has listed a whole bunch of names, and then, in the field, it has these folks. But we were not aware, based on the information we had, that they were part of the discussions or, you know, in the direct vicinity of that. I have not had that information, and I don't know that anybody ever suggested that, either.

Kerntz was unaware of whether any of the listed employees were "in the direct vicinity," because he never asked any of them if they were. The only way the other employees had no "relevant information" was if Kerntz already had decided to credit Jung's and Regenscheid's version of what occurred. Indeed, Kerntz admitted this at the hearing:

> Q: According to Ms. Powers' summary, Mr. Topor did not deny returning the paperwork, did he?
> A: Well, on the top [of the Respondent's investigatory report] it says—I asked, "Did Gary ask you for the procedure back before you left?" He indicated, "No."
> Q: He indicated he never heard a request for it back, didn't he?
> A: I don't know exactly what his response was, but I have account from—
> Q: Okay—
> A: —two supervisors.
> Q: —okay—

A: —that said otherwise.

. . .

A: . . . What I can tell you is that, you know, we made a decision based on the information we had. We had a clear account from two supervisors that I feel are very credible. They were very consistent in their accounts of what happened, and that is what we went with.

As these collective responses[33] make clear, Kerntz did not pursue a clear avenue for resolving the conflicting accounts of the supervisors and Topor. I conclude the Respondent conducted an inadequate investigation from November 7 to 9, designed simply to substantiate its supervisors' versions of what occurred and justify their sending Topor home on November 4. In these circumstances, the Respondent's lack of an objective and complete investigation is circumstantial evidence of pretext, establishing animus towards Topor's protected concerted activity. See, e.g., *Woodlands Health Center*, 325 NLRB 351, 364–365 (1998) (failure to interview two residents whom employee was alleged to have abused indicative of inadequate investigation); *Sheraton Hotel Waterbury*, 312 NLRB 304, 322 (1993) (failure to interview other witnesses to alleged insubordination supported finding of unlawful motivation).[34]

Finally, the Respondent's asserted reasons for disciplining Topor included that he pointed his finger at Regenscheid and refused to return the step change form. Because I have determined neither of those things occurred, the asserted reasons are false and pretextual.

For all these reasons, I conclude the General Counsel has established the Respondent harbored animus towards Topor's protected activity.

3. Did the Respondent establish it would have suspended Topor, irrespective of his protected conduct?

Having found protected activity, knowledge, and animus, I conclude the General Counsel has met the initial burden under *Wright Line*. Thus, the burden shifts to the Respondent to prove that it would have suspended Topor, even absent his protected activity. The only argument the Respondent makes in this regard is that it had a reasonable belief Topor engaged in misconduct and acted on that belief. An employer can meet its *Wright Line* burden where it demonstrates a reasonable belief the employee engaged in misconduct and the

[33] Tr. 678, 698, 702, 704–705.

[34] In drawing this conclusion, I have heeded the Board's directive that the fact an employer does not pursue an investigation in some preferred manner before imposing discipline does not necessarily establish an unlawful motive. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004). However, the record here demonstrates the Respondent could have uncovered additional, critical evidence had it conducted a deeper investigation. See *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 436 (D.C. Cir. 2012). Indeed, it only needed to interview Rennert to do so. Following Topor's interview, the Respondent had four additional days where it could have spoken to Rennert, because Whatley did not return from vacation until November 14.

employer would have terminated any employee for the same misconduct. *Midnight Rose Hotel & Casino,* 343 NLRB 1003, 1005 (2004); *Rockwell Automation/Dodge,* 330 NLRB 547, 549–550 (2000). Where such a reasonable belief is demonstrated, the employer still retains the obligation to show it would have, not could have, taken the same action, absent the employee's protected conduct. *6 West Limited Corp.*, 330 NLRB 527, 528 (2000), citing *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998); *Centre Property Management,* 277 NLRB 1376, 1376 (1985).

Because of the Respondent's inadequate investigation, I cannot find it had a reasonable belief Topor engaged in the alleged misconduct. See, e.g., *Alstyle Apparel*, 351 NLRB 1287, 1287–1288 (2007) (employer did not meet its *Wright Line* burden, where it conducted limited investigation into employee misconduct); *Midnight Rose Hotel*, 343 NLRB at 1005 (failure to conduct fair investigation defeated claim that employee engaged in theft); cf. *Rockwell Automation/Dodge*, supra (employer had reasonable belief that employee falsified work report form, where employee stated during the investigation that he would have reached the same conclusion if he viewed the situation from the employer's perspective).

Even if I did find the belief reasonable, the preponderance of the evidence fails to establish the Respondent would have suspended Topor absent his protected activity. The Respondent relies solely on the authority granted to it by the collective-bargaining agreement and its work rules to discharge employees for a first offense of insubordination, dishonesty, or unauthorized removal of company property. Such standards for disciplining employees, due to the same misconduct Topor was alleged to have committed, support the Respondent's position. *Bronco Wine Co.*, 256 NLRB 53, 54 fn. 10 (1981). But the Respondent did not demonstrate it actually exercised the authority in the past and treated employees similarly when they engaged in the same misconduct. It also did not show that it never before encountered a similar situation. Going back to *Fresenius USA Manufacturing,* the Board concluded the employer there met its *Wright Line* burden by showing its discharge of the employee was consistent with discipline it imposed for similar violations in the past. 362 NLRB No. 130, slip op. at 2. In particular, the employer previously terminated two other employees for dishonesty during an investigation. The Board noted: "[D]epending on the evidence in a particular case, employers may satisfy their *Wright Line* burden in these circumstances, for example, by demonstrating that dishonesty served as an independent (if not sole) reason for prior terminations, or that a practice of discipline for similar acts of dishonesty exists." See also *Rockwell Automation/Dodge*, supra (employer sustained *Wright Line* burden by showing it previously discharged two employees who committed the same misconduct). In this case, the Respondent introduced no evidence that it previously disciplined employees for insubordination, theft of company property, or dishonesty. The Respondent possesses all of that information and could have presented it. The only inference that can be drawn is that such evidence would not have shown the Respondent treated Topor similarly to other employees in the past. Consequently, the Respondent only demonstrated it could have disciplined Topor, not that it would have. That showing is insufficient to sustain its *Wright Line* burden.[35]

[35] In reaching these conclusions, I find the Respondent could rely upon Topor's dishonest assertion, when he initially denied speaking to Rowe during Kerntz's investigatory interview of him. The

For all these reasons, I conclude the Respondent's 10-day unpaid suspension of Topor, its issuance of a final written warning to him, and the associated denial of his quarterly bonus violate Section 8(a)(1) of the Act.

III. DID THE RESPONDENT'S SUSPENSION OF AND OTHER ADVERSE ACTIONS IMPOSED UPON TOPOR VIOLATE SECTION 8(A)(3)?

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The General Counsel contends that the Respondent's adverse actions towards Topor also violate Section 8(a)(3), because they were motivated by his union activities in support of Teamsters Local 120. This allegation likewise must be evaluated under the *Wright Line* standard.

With respect to the General Counsel's initial burden, the record evidence establishes that Topor engaged in union activity of which the Respondent was aware. Topor served as a union steward for 3 years at the time of the hearing. He also was a part of the Union's negotiating team during the initial round of successor contract negotiations in the late summer or early fall of 2015, prior to his suspension. The Respondent plainly was aware of these activities, given Topor's roles and the involvement of Whatley and Kerntz in the negotiations.[36]

However, I find the evidence insufficient to establish the Respondent harbored animus towards Topor's union activity from 2015. No evidence of specific animus was presented. Furthermore, Topor's opposition to the contract extension occurred at least one year before his suspension. The extreme remoteness in time of his union activity to the adverse actions belies the claim that the Respondent harbored animus towards it. *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (2 months between union activity and warning was too remote in time to show animus); *Laidlaw Environmental Services*, 314 NLRB 406, 406 fn. 1 (1994) (antiunion statement made to employee 7 to 8 months prior to his suspension was too remote in time to show animus).

Respondent's decision to place Topor on administrative leave and to conduct an investigation was based on facially valid reports of alleged misconduct submitted by Jung and Regenscheid to Kerntz. Employers have a legitimate business interest in investigating such complaints. *Fresenius USA Manufacturing* 362 NLRB No. 130, slip op. at 1–2. Kerntz's questioning of Topor was narrowly tailored to the events in question. Even though the questioning addressed Topor's protected concerted activity, the inquiry was related to Topor's job performance and the employer's ability to operate its business. The Board's concern over revealing an employee's private union activity is not present here and revealing protected concerted discussions with supervisors about job safety does not raise the same privacy concerns. Consequently, Topor did not have a right to respond untruthfully to Kerntz's questions. Nonetheless, I further note, because Topor made only one dishonest assertion that he immediately corrected, his infraction was minor and an intent to deceive was lacking.

[36] Although Topor also opposed extending the existing contract, the record does not make clear whether the Respondent's negotiators were aware of that fact.

In support of its animus argument, the General Counsel first alleges that Regenscheid violated Section 8(a)(1), during his one-on-one conversation with Rennert sometime between September and November 2016. To review, Regenscheid stated to Rennert therein "Don't be surprised if a few people get fired, and they start searching lunchboxes when you go out the gate and have the dogs sniffing cars." Rennert asked him why they would do that. Regenscheid responded "Your contract is coming up." Rennert said, "Do you really think that they would do that?" Regenscheid said "Yeah, I do." The test of whether a statement is unlawful under Section 8(a)(1) is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction. *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011). A statement that an employee who also served as a union bargaining representative is going to be watched, caught, and fired after the unit's rejection of a company's contract proposal is an unlawful threat. *Fort Dearborn Co.*, 359 NLRB 199, 199 (2012), reaffd. 361 NLRB 924 (2014). Similarly here, Regenscheid suggested the Respondent would increase its surveillance of and even discharge employees due to contract negotiations. His statements would reasonably tend to interfere with employees' exercise of Section 7 rights and violate Section 8(a)(1). Nonetheless, the statements were not directed at Topor, but at Rennert, who was not involved in the union, and the statements involved conduct wholly unrelated to that which led to Topor's suspension. Accordingly, and in agreement with the Respondent, I find this lone threat made to one employee is insufficient to sustain the General Counsel's animus burden. See *Snap-On Tools*, 342 NLRB at 9; *ASC Industries, Inc.*, 217 NLRB 323, 323 (1975).

The General Counsel also argues that animus is established based upon the disproportionate level of discipline given to Topor. Disproportionate discipline may support a finding of discriminatory motive. See, e.g., *Abbey's Transportation Services, Inc.*, 284 NLRB 698, 700 (1987) (animus demonstrated in part by record evidence that discharges of discriminatees were disproportionately severe compared to how other employees had been treated in the past); *Tamper, Inc.*, 207 NLRB 907, 933 (1973) (grossly disproportionate treatment of discriminatee when compared to employer's general policy on discipline supported animus finding). I find the record evidence insufficient to establish the Respondent's discipline of Topor was disproportionate. The Respondent could have discharged Topor for his alleged misconduct, because the parties' contract called for termination for an employee's first offense of dishonesty. Rather than discharging him, the Respondent instead imposed the lesser discipline of a suspension and final written warning. Moreover, the General Counsel did not offer any disciplinary records of the Respondent showing that other employees had been treated with greater leniency in the past.

I also find no merit to the General Counsel's claim of disparate treatment. The argument relies upon the fact the Respondent did not discipline Rennert, who has no position in the Union, for refusing to heat up the HCl cylinders the day after Topor was sent home for the same refusal. Even if this did constitute disparate treatment, it is an example involving a lone employee insufficient to support a finding of discriminatory motive. *Synergy Gas Corp.*, 290 NLRB 1098, 1103 (1988) (one aberrant occurrence in failing to enforce discipline rules not indicative of disparate treatment). Beyond that and given the sequence of events, Regenscheid's response to Rennert simply suggests he did not want to experience the same scenario with

Rennert that he did the day before with Topor. It is not indicative of treating Rennert differently because he was not involved with the Union.

As a result, I conclude the General Counsel has not met the initial burden of demonstrating the Respondent's adverse actions towards Topor were motivated by his union activity. I recommend dismissal of the 8(a)(3) allegation.

CONCLUSIONS OF LAW

1. Respondent St. Paul Park Refining Co., LLC, d/b/a Western Refining, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local No. 120, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

   (a) At some point between September and November 2016, threatening employees with termination, surveillance, and stricter enforcement of work rules due to their union activity;
   (b) On or about November 14, 2016, issuing Richard Topor a final written warning and 10-day unpaid suspension due to his protected concerted activity; and
   (c) On or about January 17, 2017, denying Richard Topor a quarterly bonus due to his protected concerted activity.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent has not violated the Act in the other manners alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular and to remedy the unlawful suspension and denial of a quarterly bonus to Richard Topor, I shall order the Respondent to rescind the suspension and make Topor whole for any loss of earnings and other benefits attributable to the unlawful conduct, including restoring his quarterly bonus. Backpay for Topor shall be computed as prescribed in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate Topor for the adverse tax

consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 18 a report allocating Topor's backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.[37] The Respondent also shall be required to remove from its files any and all references to its unlawful actions and to notify Topor in writing that this has been done and the discipline will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, St. Paul Park Refining Co., LLC, d/b/a Western Refining, St. Paul Park, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Threatening employees with termination, surveillance, and stricter enforcement of work rules, due to their union activity.

   (b) Suspending, issuing a final written warning to, and denying a quarterly bonus to employees, due to their protected concerted activity.

   (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Make Richard Topor whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

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[37] The General Counsel's complaint sought a requirement that Topor be reimbursed for "consequential damages," as part of the remedy. However, the General Counsel makes no argument in the post-hearing brief as to why I should award this remedy. I am aware that, in this case and others, the General Counsel is seeking a change in Board law. *Seeking Reimbursement for Consequential Economic Harm*, OM 16-24 (July 28, 2016), available at http://apps.nlrb.gov/link/document.aspx/09031d458219114a. Such a change must come from the Board, not an administrative law judge. Accordingly, I decline to include the requested remedy in my recommended order.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor and, within 3 days thereafter, notify him in writing that this has been done and that these unlawful acts will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its St. Paul Park, Minnesota facility copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2016.[40]

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[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[40] This date normally reflects the date of the first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17 (1997). The first unlawful act in this case was Regenscheid's statements to Rennert which violated Sec. 8(a)(1). However, Rennert could not pinpoint the exact date when his conversation with

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., December 20, 2017.

Charles J. Muhl
Administrative Law Judge

Regenscheid occurred, stating instead that it was between September and November 2016. Accordingly, I find September 1, 2016, to be the appropriate date to use in this context.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with termination, surveillance, or stricter enforcement of work rules, due to your union activity.

WE WILL NOT suspend you, issue you a final written warning, or deny you a quarterly bonus, due to your protected concerted activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Richard Topor whole for any loss of earnings and other benefits resulting from his unlawful suspension and denial of a quarterly bonus, plus interest.

WE WILL compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor, and WE WILL, within 3 days thereafter, notify him in writing that this had been done and that these unlawful actions will not be used against him in any way.

ST. PAUL PARK REFINING CO., LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Federal Office Building, 212 3rd Avenue S, Suite 200 Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at **www.nlrb.gov/case 18–CA–187896** or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.